

P.E.R.C. NO. 2017-17

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-2016-058

FRATERNAL ORDER OF POLICE,
LODGE 62,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the request of Rutgers for a restraint of binding arbitration of a grievance filed by the FOP. The grievance contests a unit member's 96-hour suspension and the denial of senior officer status as a result of the suspension. The Commission holds that arbitration of the merits of major discipline, which includes a 96-hour suspension, are precluded from binding arbitration and that an alleged contractual violation regarding senior officer status is legally arbitrable. The Commission declines to restraint arbitration with respect to alleged violations of contractual disciplinary procedures.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, McElroy, Deutsch, Mulvaney &
Carpenter, LLP, attorneys (John J. Peirano, of counsel
and on the brief; James P. Lidon, on the brief)

For the Respondent, Brickfield & Donahue, attorneys
(Joseph R. Donahue, of counsel and on the brief)

DECISION

On March 14, 2016, Rutgers, The State University of New of
New Jersey ("Rutgers") filed a scope of negotiations petition
seeking a restraint of binding arbitration of a grievance filed
by the Fraternal Order of Police, Lodge 62 ("FOP Lodge 62"). The
grievance alleges that Rutgers violated the parties' collective
negotiations agreement (CNA) when it suspended a unit member for
96 hours and later denied his request for senior officer status.
The grievance also alleges that the officer was disciplined in
violation of Rutgers' written disciplinary process.

Rutgers has filed briefs, exhibits, and the certification of Deputy Chief Michael J. Rein. FOP Lodge 62 filed a brief with exhibits.^{1/} These facts appear.

FOP Lodge 62 represents all full-time University Police Officers, excluding probationary employees and all supervisors. FOP Lodge 62 and Rutgers are parties to a CNA in effect from July 1, 2006 through June 30, 2009. The grievance procedure ends in binding arbitration.

Deputy Chief Rein certifies that on April 20, 2015, Rutgers notified the grievant that he was suspended without pay for a total of 96 hours, with the suspension to be served between April 14 and April 29, and between April 29 and May 2, 2015. The suspension was imposed after an Internal Affairs investigation that resulted in several charges being sustained against the grievant.

On May 7, 2015, FOP Lodge 62 filed a grievance challenging the suspension. On May 11, the initial grievance was withdrawn and replaced by another grievance. The grievance alleges that Rutgers violated numerous provisions of the CNA as well as provisions of the Rutgers University Police Department Written

^{1/} FOP Lodge 62 submitted the certification of its counsel to authenticate an unpublished court decision attached to its brief as Exhibit A. FOP Lodge 62 did not support any pertinent facts with a certification based upon personal knowledge per N.J.A.C. 19:13-3.6(f).

Directive System and the New Jersey Attorney General Guidelines for Investigation and Adjudication of Serious Complaints.

Specifically, the grievance alleges violations of the following contractual provisions, in pertinent part:

ARTICLE 5 - POLICE OFFICER'S BILL OF RIGHTS

- 1. No officer shall be discharged, suspended or disciplined except for just cause. Before an officer is suspended for a period in excess of five (5) days, involuntarily demoted, or terminated, the University Police Department shall conduct an interview with the officer at which time the officer will be informed of the reasons for the interview and the officer may respond.
* * *
- 5. An officer being formally questioned after investigation of a complaint arising outside the University Police Department shall be entitled to have FOP-P representation during such questioning. The officer will be informed of the nature of the investigation and of the name and the address of the complainant, if known, before such questioning commences. . . .
* * *
- 10. If an officer is being questioned about his/her work performance or conduct and if the officer has a reasonable belief that the answers to such questions will result in discipline, then the officer may request that an FOP-P representative be present.
* * *

ARTICLE 40 - UNIVERSITY PROCEDURES

Rutgers and the FOP-P agree that officers shall be entitled to enjoy, and shall be subject to, all terms and conditions of employment applicable to the bargaining unit provided for in the University procedures even though not specifically provided for herein. Neither party waives any rights it may have by virtue of the New Jersey statutes. Copies of all university procedures, and revisions thereto, pertaining to Officers in this unit shall be given to the FOP-P President or his/her designee as soon as they are promulgated.

ARTICLE 41 - MISCELLANEOUS

* * *

2. Rutgers may from time to time, establish and issue reasonable rules and regulations concerning the work to be performed by and the conduct of its officers, including a disciplinary code, and it shall apply and enforce such rules and regulations fairly and equitably. These rules and regulations shall not be inconsistent with the terms of this Agreement. Departmental regulations and discipline code shall be published in a manual and in that form, distributed to all officers. Changes to the manual shall be by means of an addendum. Neither party waives any rights it may have by virtue of the New Jersey Statutes. Copies of departmental rules and regulations and of general orders, and revisions thereto, pertaining to Officers in this unit shall be given to the FOP-P President or his/her designee as soon as they are promulgated.

Rutgers denied the grievance following step 1 and step 2 grievance hearings on May 13 and May 26, respectively.

On June 16, 2015, the grievant made a written request that he be appointed to the title of Senior Officer as of July 1, which was his eighth anniversary of service with Rutgers. On July 22, Acting Captain Paul Fischer issued a memorandum to the grievant advising him that his request for appointment to Senior Officer status was denied because he was ineligible due to his suspension for poor work performance (the 96-hour suspension that was the subject of the earlier grievance).

The contractual provision regarding salary guide movement to "Senior Officer" status provides, in pertinent part:

ARTICLE 21 - SALARY

* * *

3. Appointment to Senior Officer.

* * *

B. Officers Entering the Unit On or After October 15, 2001

After a police officer has completed eight (8) years of service in the negotiations unit, he/she will be appointed to the new title of Senior Officer, provided said officer has notified, in writing, his/her supervisor that he/she has completed eight (8) years of service in the negotiations unit and provided said officer has not been suspended for poor work performance in the previous year.

On July 30, FOP Lodge 62 filed a grievance challenging denial of Senior Officer status and reiterating the challenges to the suspension and disciplinary procedures contained in the earlier grievance. On August 4, Rutgers denied the grievance following a step 3 hearing. On September 1, FOP Lodge 62 demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978) states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER

Supp.2d 130 (¶111 App. Div. 1983). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

Rutgers asserts that the imposition of a 96-hour suspension is a form of major discipline of a police officer and therefore may not be contested through contractual binding arbitration procedures. As for the grievance regarding denial of senior officer status, Rutgers argues that Article 21, Paragraph 3.B. of the CNA precluded the grievant's attainment of senior officer status for that year due to the suspension he received.

FOP Lodge 62 asserts that N.J.S.A. 34:13A-5.3 of the New Jersey Employer-Employee Relations Act ("Act") expressly provides for arbitration of major discipline if agreed to by the parties, and that the CNA provides for binding arbitration. FOP Lodge 62 argues that even if Rutgers' managerial prerogative to discipline the grievant is not arbitrable, binding arbitration is permitted over the way the disciplinary proceedings were conducted and whether the denial of senior officer status was improper.

Police officers may not contest the merits of major disciplinary sanctions (suspensions or fines of more than five days, demotions, and terminations) through contractual binding

arbitration. State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993). In State Troopers, the Supreme Court held that disputes over the merits of all police disciplinary sanctions are not legally arbitrable. In 1996, the Legislature amended section 5.3 of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., to provide that disciplinary review procedures may provide for binding arbitration of disputes involving minor discipline of any public employees except State police. In Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997), the Appellate Division clarified that the 1996 amendment did not expand the right to binding arbitration for police officers beyond review of minor disciplinary actions.

In previous cases involving Rutgers and its police unions, we have cited State Troopers and Monmouth in restraining arbitration of grievances contesting major disciplinary sanctions including terminations, a demotion, and an 80-hour suspension. See Rutgers, The State Univ. and FOP Lodge 62, P.E.R.C. No. 2007-5, 32 NJPER 274 (¶113 2006), aff'd 33 NJPER 199 (¶70 App. Div. 2007); Rutgers, The State Univ., P.E.R.C. No. 96-22, 21 NJPER 356 (¶26220 1995); Rutgers, The State University and Fraternal Order of Police, SOA, P.E.R.C. No. 2013-12, 39 NJPER 151 (¶47 2012); and Rutgers, The State University and FOP Lodge 62, P.E.R.C. No. 2015-8, 41 NJPER 101 (¶35 2014), aff'd App. Div. Dkt. No. A-0455-14T1 (9/8/2016); accord NJIT and NJIT Superior Officers

Association, P.E.R.C. No. 2003-9, 28 NJPER 343 (¶33120 2002), aff'd 29 NJPER 415 (¶139 2003); NJIT, P.E.R.C. No. 2001-69, 27 NJPER 239 (¶32083 2001); NJIT, P.E.R.C. No. 98-3, 23 NJPER 449 (¶28210 1997).

Moreover, the 2003 and 2005 amendments to N.J.S.A. 34:13-5.3 cited by FOP Lodge 62 do not disturb the holdings of State Troopers and Monmouth and subsequent Commission decisions.^{2/} Since the passage of those amendments, the Commission has consistently held that State Troopers and Monmouth continue to preclude negotiated grievance procedures providing for binding arbitration of major disciplinary disputes involving police officers. See Rutgers, 41 NJPER 101 at 103; Rutgers, 32 NJPER 274; and Rutgers, 39 NJPER 151. Accordingly, the grievant cannot seek arbitral review of his 96-hour suspension.

Next, we decline to restrain binding arbitration over the grievance's alleged violations of contractual disciplinary and investigatory policies and procedures.^{3/} Generally, procedural

^{2/} P.L. 2003, c. 119 amended N.J.S.A. 34:13-5.3 to make binding arbitration of major discipline mandatorily negotiable for unionized employees of the State of New Jersey (except for the State Police). P.L. 2005, c. 380 added a presumption of arbitrability when interpreting a public sector grievance arbitration clause.

^{3/} Based largely upon a statement in the FOP's brief that it "seeks to arbitrate whether the manner in which the disciplinary proceedings were conducted was improper," we have surmised that the grievance pertains in part to

(continued...)

safeguards associated with discipline and investigations intimately and directly affect employees and do not significantly interfere with the ability of a public employer to impose discipline. FOP Lodge 62's procedural claims may be considered by an arbitrator independent of Rutgers' substantive decision to impose major discipline. See, e.g., City of Newark, P.E.R.C. No. 2012-19, 38 NJPER 191 (¶64 2011) (major discipline was not arbitrable, but procedural safeguards associated with discipline were arbitrable); City of Newark, P.E.R.C. No. 2010-62, 36 NJPER 50 (¶23 2010) (decision to impose major discipline was not arbitrable, but procedural claims of notice, opportunity to be heard, and adherence to contractual two-track disciplinary process were legally arbitrable); UMDNJ, P.E.R.C. No. 2010-45, 35 NJPER 461 (¶152 2009) (procedural protections such as reason for the action, an opportunity to respond, and written charges prior to being placed on administrative leave do not significantly interfere with a public employer's ability to conduct investigations or to impose discipline); City of Elizabeth, P.E.R.C. No. 2007-16, 32 NJPER 321 (¶133 2006) (transfers of officers could not be arbitrated, but notice of reasons, notice to the union of charges, and opportunity to respond were arbitrable procedural issues); Atlantic Cty.

3/ (...continued)
disciplinary procedures.

Sheriff's Office, P.E.R.C. No. 2005-28, 30 NJPER 444 (¶147 2004) (major discipline determination is not arbitrable, but procedural protections including right to counsel, right to a written complaint as soon as possible, and right to union representation are legally arbitrable); NJIT, 28 NJPER 343, aff'd 29 NJPER 415, supra (substantive decision to impose major discipline is not arbitrable, but procedural safeguards such as right to counsel during disciplinary proceedings are arbitrable); Woodbridge Tp., P.E.R.C. No. 99-58, 25 NJPER 47 (¶30020 1998) (allegation that contractual procedures were violated during the investigation of the incidents prompting the discipline was arbitrable).

In a previous case involving Rutgers and the FOP, Rutgers 21 NJPER 356, cited above and by Rutgers for the proposition that police officers may not contest major discipline through binding arbitration, the Commission held that the procedural claims were arbitrable, stating:

The FOP contends that other recent cases permit binding arbitration of claims asserting that a disciplined police officer was denied alleged procedural rights such as a pre-discipline hearing. . . . We agree with this proposition as well and will accordingly decline to restrain arbitration over the procedural claims that Caldwell was improperly denied a pre-termination hearing and union representation during an investigatory interview.

[21 NJPER 356 at 357; internal citations omitted.]

Moreover, in the instant case, Rutgers does not assert that any of the parties' negotiated disciplinary procedures are not

mandatorily negotiable, nor does it argue why arbitration over these aspects of the grievance should be restrained.

Accordingly, FOP Lodge 62 may arbitrate its allegations that Rutgers violated contractual policies and procedures during the disciplinary and investigatory process.^{4/} We repeat that any challenge to a final major disciplinary determination cannot be made to an arbitrator.

Finally, FOP Lodge 62's challenge regarding denial of the grievant's request to advance on the salary guide to senior officer status is legally arbitrable. Absent preemption, compensation, including appropriate placement on a salary guide, is a mandatorily negotiable term and condition of employment. See, e.g., Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 7 (1973); Woodstown-Pilesgrove Reg. School Dist. v. Woodstown-Pilesgrove Reg. Ed. Ass'n., 81 N.J. 582, 589 (1980); Hackensack Bd. of Ed., P.E.R.C. No. 2016-20, 42 NJPER 192 (¶51 2015); City of Newark, P.E.R.C. No. 2015-19, 41 NJPER 168 (¶59 2014); Kingwood Tp. Bd. of Ed., P.E.R.C. No. 2014-34, 40 NJPER 260 (¶100 2013); and City of Bridgeton, P.E.R.C. No. 2011-24, 36

^{4/} We clarify that our refusal to restrain arbitration over the litany of alleged contractual, policy, and statutory violations contained in FOP Lodge 62's grievance does not mean that we have adjudged each cited provision as presenting a mandatorily negotiable procedural issue in this case. In fact, neither party asserted negotiability arguments specifically addressing the contractual and policy violations alleged in the grievance.

NJPER 353 (¶137 2010). Consistent with the limits of our scope of negotiations jurisdiction pursuant to Ridgefield Park, supra, we express no opinion on Rutgers' assertion that Article 21, Paragraph 3.B. of the CNA precludes the grievant's advancement on the salary guide due to a suspension for poor work performance in the previous year. Rutgers' contractual basis for denying senior officer status may be argued before the arbitrator. We note, however, that the grievant's 96-hour suspension in 2015 remains a fact that cannot be challenged during arbitration of the senior officer status grievance because it was a non-arbitrable exercise of the managerial prerogative to impose major discipline on police officers.

ORDER

The request of Rutgers, the State University of New Jersey for a restraint of binding arbitration is granted to the extent the grievance contests the merits of the 96-hour major disciplinary suspension. The request is otherwise denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Wall voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Voos recused herself.

ISSUED: September 22, 2016

Trenton, New Jersey